CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON, PETITIONER,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 30, 1935.

CERTIORARI GRANTED FEBRUARY 10, 1936.

SUPREME COURT OF THE UNITED STATES

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J. W. TIPTON, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1936.

—7484-C

[fols. 1 & 2] Names and addresses of attorneys omitted in printing.

[fol. 3] Citation, in usual form, showing service on Robert Brennan and Leo E. Sievert, filed June 28, 1934, omitted in printing.

[fol. 4]

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

No. 51588

J. W. TIPTON, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT (Personal Injury)—Filed Jan. 26, 1934

Plaintiff complains of defendant and for cause of action alleges:

I

That at all times herein mentioned defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas and domiciled in that state, and that defendant corporation at all times herein mentioned was duly authorized to do business in the State of California, and that at all times herein mentioned said defendant corporation was doing business and engaging as a common carrier by railroad in interstate commerce in Fresno County, State of California:

II

That at all times herein mentioned defendant corporation ran and operated a line of railroad over and across the County of Fresno, State of California, and defendant main-
[fol. 5] tained various places of business in said county of Fresno, State of California, and that on the tracks of defendant where the accident hereinafter — ocurred defendant maintained at all times herein mentioned a highway of

interstate commerce, [and at all times herein mentioned plaintiff and defendant were engaged in interstate commerce.]

[By consent of counsel in open court stricken out. Hollzer J. Apr. 16/34.]

III

That on or about the 21st day of September, 1932, in the town of Riverbank, State of California, at or about the hour of 2:35 o'clock A. M. of said day plaintiff was regularly employed by defendant as a switchman, and plaintiff was so employed at the time and place of the accident hereinafter alleged.

IV

That while plaintiff was employed by defendant as aforesaid, it was plaintiff's duty to assist in spotting car A. T. 9358 at a store house of defendant and to be between said car and the warehouse platform and to cross over on the opposite side of a certain yard engine to get on the footboard of said engine; that at said time and place it was the duty of a fellow employee of plaintiff named Woods to pull a cut-lever to detach said car A. T. 9358 from the engine, and that said Woods did pull said cut-lever to detach said car from the engine and upon pulling the said cut-lever the said car failed to uncouple by reason of the fact that the automatic coupling apparatus of said car was defective, inefficient and out of repair in violation of the Federal Safety Appliance Acts and in violation of Section 2 of Chapter I [fol. 6] of Title 45 on Railroads, United States Code, Annotated; that by reason of said failure of said car to uncouple as aforesaid and by reason of the fact that the clearance between said car and said warehouse platform was close, said car A. T. 9358 struck plaintiff and caused him to be injured as hereinafter set forth.

V

That by reason of the facts hereinbefore set forth and as a direct and proximate result of the failure of said car to uncouple and of the inefficient, defective condition of said coupling apparatus as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered and his left lower leg was crushed, and he suffered a severe sclerosis, a severe injury to the bone of said leg and pitting of the bone of said

leg, together with an involvement of the nerves of said leg, together with an extreme and severe shock to his nervous system and extreme pain and suffering, and said injuries are and will be permanent.

VI

That at the time of the accident hereinbefore set forth and for a long time prior thereto plaintiff was an able bodied man and capable of earning an average salary of about $200.00 per month; that for many years prior thereto plaintiff had specially educated and trained himself for railroad service as brakeman and switchman, and that by reason of the injuries hereinbefore set forth plaintiff was wholly incapacitated to follow such business or the business of railroading and by reason thereof plaintiff has been totally incapacitated.

VII

That by reason of the facts hereinbefore set forth plaintiff has been damaged in the sum of Forty Thousand ($40,000.00) Dollars.

[fol. 7] Wherefore, plaintiff prays judgment against defendant in the sum of Forty Thousand ($40,000.00) Dollars, and for costs of suit incurred herein.

Werner & Hildebrand, by Clifton Hildebrand, Attorneys for Plaintiff, 1212 Broadway, Oakland, Calif., 535 Rowan Bldg., Los Angeles.

Duly sworn to by Clifton Hildebrand. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 8] IN SUPERIOR COURT OF FRESNO COUNTY

[Title omitted]

DEMURRER—Filed Feb. 20, 1934

Comes now the defendant above named and demurs to the complaint of the plaintiff on file herein upon the following grounds:

I

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for Defendant.

[fol. 9] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Ethel Magnuson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 436 Kerckhoff Building, 560 South Main Street, Los Angeles, California; that on the 19th day of February, 1934, affiant served the within Demurrer on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiff at the office address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) "Messrs. Werner & Hildebrand, Attorneys at Law, 535 Rowan Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with the postage thereon fully prepaid, in the United States Post Office at Los Angeles, [fol. 10] California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Ethel Magnuson.

Subscribed and sworn to before me this 19 day of February, 1934. Nellie B. Passfield, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Present: The Honorable H. A. Hollzer, District Judge.

No. 718—Civ.

J. W. TIPTON, Plaintiff,

vs.

A., T. & S. F. RAILWAY COMPANY, Defendant

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—April 16, 1934

This cause coming on for hearing on Demurrer to Complaint; Thos. F. McCue, Esq., appearing for the plaintiff, and Leo E. Sievert, Esq., appearing for the defendant,

Now, at the hour of 1:54 o'clock p. m. counsel argue to the Court, and by stipulation of counsel in open court, the balance of sentence, Line 29, page — commencing with the word "and" is stricken from the Complaint; whereupon,

The Court orders said Demurrer sustained without leave to amend, and an exception is allowed the plaintiff thereto.

[fol. 12] IN UNITED STATES DISTRICT COURT

No. 718—Civil

J. W. TIPTON, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corp., Defendant

JUDGMENT

On the 16th day of April, 1934, this cause came on for hearing on defendant's demurrer to plaintiff's complaint, and the court made and entered an order herein, sustaining defendant's demurrer, without leave to plaintiff to

amend his complaint, and said cause is accordingly dismissed;

Now, therefore, by virtue of the law and by reason of the premises as aforesaid,

It is ordered, adjudged and decreed that this cause be, and the same is hereby, dismissed.

Costs $20.00.

Judgment entered and recorded April 28th, 1934.

R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed June 28, 1934

The plaintiff, J. W. Tipton, feeling aggrieved by the judgment made and entered herein on the 28th day of April, 1934, whereby it was ordered and adjudged that plaintiff's cause of action be dismissed and granting and adjudging costs against the plaintiff, does hereby appeal from said judgment and the whole thereof, to the Circuit Court of Appeals of the United States for the Ninth Circuit, and prays that his appeal be allowed.

That a transcript of the record of the proceedings, including the minutes of the court upon the hearing of the Demurrer herein, the judgment roll upon which said judgment was entered, duly authenticated, may be sent to the [fol. 14] United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 18, 1934.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff.

Service of the within Petition for Appeal is hereby admitted by copy this 27th day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 28, 1934

The plaintiff says there is manifest error in the record herein and assigns and specifies the following as such:

1. That the court erred in entering the order on the 16th day of April, 1934, sustaining the defendant's Demurrer to plaintiff's complaint without leave to amend the same.

2. That the court erred in giving and making and entering judgment herein on the 28th day of April, 1934, which judgment dismisses plaintiff's cause of action and grants costs against the plaintiff.

[fol. 16] 3. That the judgment specified in Assignment No. 2 herein, is contrary to and against law.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff.

Service of the within assignment of errors is hereby admitted by copy this 27 day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 28, 1934

It appearing that the plaintiff J. W. Tipton, has heretofore filed his Petition for Appeal from the judgment made and entered herein on the 28th day of April, 1934, to the Circuit Court of Appeals of the United States for the Ninth Circuit—

It is therefore ordered, that the appeal of J. W. Tipton, from the judgment entered herein on the 28th day of April, 1934, to the United States Circuit Court of Ap-

peals for the Ninth Circuit, be and the same is hereby allowed—

[fol. 18] It is further ordered, that the plaintiff execute and furnish an undertaking for the purpose of securing costs of this appeal in the sum of $250.00.

Dated this 26 day of June, 1934.

Hollzer, United States District Judge.

Service of the within Order Allowing Appeal is hereby admitted by copy this 27 day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 19-22] Bond on appeal for $250.00, approved and filed July 14, 1934, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed June 28, 1934

To the Clerk of the above-entitled Court:

Please make up and certify the record on appeal heretofore allowed herein and include in the transcript therein, the following:

1. The complaint.
2. The demurrer.
3. The minutes of the court taken and entered upon the hearing of said demurrer.
4. Assignment of Errors.
5. Petition for Appeal.
6. Order Allowing Appeal.

[fol. 24] 7. Citation on Appeal.

8. Cost Bond on Appeal
9. The judgment.

10. This præcipe.

Dated May 18, 1934.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff, and Appellant.

Service of the foregoing within præcipe is hereby admitted by copy this 27th day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

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In the District Court of the United States, Southern District of California, Northern Division.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, complaint, demurrer, minute order of April 16, 1934, sustaining demurrer, judgment, petition for appeal, assignment of errors, order allowing appeal; cost bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $31.00 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $4.00 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 7th day of August, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By R. S. ZIMMERMAN.

No. 7571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. TIPTON,

Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Wednesday, January 23, 1935.

Before: WILBUR and GARRECHT, Circuit Judges, and CAVANAH, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Clifton Hildebrand, counsel for appellant, and by Mr. Leo V. Sievert, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel to file certified copy of petition for removal and order of removal, and further briefs x 5 x.

CERTIFIED COPY OF ORDER OF REMOVAL.

In the Superior Court of the State of California in and for the County of Fresno.

No. 51588.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

PETITION FOR REMOVAL.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, and presents this its petition for the removal of the above entitled cause to the District Court of the United States for the Southern District of California, Northern Division, and in that behalf respectfully shows:

I.

That The Atchison, Topeka and Santa Fe Railway Company, a corporation, is defendant in the above entitled action. That at the time of the commencement of said action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Kansas, with its principal place of business in the City of Topeka, in said State, and that it is not now and was not at

the time of the commencement of this action and never has been a corporation organized and existing under and by virtue of the laws of the State of California. That it was at all of said times and that it is now a citizen and resident of the State of Kansas, and that it is not now and was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of the State of Kansas, and a non-resident of the State of California.

II.

That the plaintiff J. W. Tipton was at the time of the commencement of said action and ever since has been and now is a citizen and resident of the State of California, and that said plaintiff was not at any of the said times and is not now a citizen or resident of the State of Kansas, but at all of said times plaintiff was and now is a non-resident of the State of Kansas.

III.

That the above entitled action is a suit of a civil nature brought by plaintiff to obtain a judgment against your petitioner for the sum of $40,000.00 as damages alleged to have been sustained by plaintiff on or about September 21, 1932, at Riverbank, California, while employed by the defendant as a switchman.

IV.

That the complaint in said action was filed on or about the 26th day of January, 1934, and was served

upon your petitioner on or about January 30, 1934, in Los Angeles, California. That according to the laws of the State of California the time within which your petitioner is required to appear, answer, demur or otherwise plead to said action has not yet expired, and your petitioner has not answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V.

That the amount in controversy in the above entitled action exceeds exclusive of interest and costs the sum and value of $3,000.00.

VI.

That this is a suit between citizens of different states and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

That this is a suit arising under the laws of the United States of America and by plaintiff's complaint purports to be based upon the Safety Appliance Acts of Congress and Acts amendatory thereto; that in said complaint there appears the allegation in paragraph II thereof "and at all times herein mentioned plaintiff and defendant were engaged in interstate commerce;" that said allegation to the effect that plaintiff at the time of his alleged injury was engaged in interstate commerce is and was false and is and was at the time said complaint was filed known by said plaintiff to be false; that

said allegation was and is fraudulently made by plaintiff in his said complaint for the sole purpose of preventing your petitioner from removing the above entitled suit to the United States District Court; that said attempt on the part of plaintiff to allege that he was engaged in the furtherance of interstate transportation or in interstate commerce was false, sham and fraudulent; that at the time of filing said complaint plaintiff well knew that at the time of his alleged injury he was not engaged in the furtherance of interstate transportation nor in interstate commerce; that in truth and in fact at the time of plaintiff's alleged injury he was engaged in the spotting in the yards of the defendant at Riverbank, California, car A. T. 9358 at the store house of this defendant; that said duty of spotting said car at the storehouse of this defendant at Riverbank was the sole work with which plaintiff was engaged at the time of his alleged injury; that said car did not contain therein any shipments of interstate commerce nor any goods destined for use in interstate commerce; that there are served and filed herewith affidavits of Clifford L. Clapp, E. O. Cook, C. C. Eastman, E. C. Goodwin, S. B. McAuley, Scott Powell, and C. H. Vandegrift, which conclusively show that said car did not contain any interstate commerce, or any goods destined for use therein; that by this reference said affidavits are made a part of this petition as though fully set forth herein; that there is also served and filed herewith a certified copy of a letter written

by plaintiff himself on the 13th day of November, 1933, to the Industrial Accident Commission of the State of California, wherein plaintiff himself stated to said Industrial Accident Commission of the State of California that he, the plaintiff, knew that said car contained no interstate commerce; that by reason of the affidavits filed herewith and said certified copy of said letter it would conclusively appear that plaintiff by his said allegation in said complaint falsely and fraudulently has attempted to prevent a removal of this action by this defendant to the United States District Court.

VII.

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will within thirty (30) days from the filing of this petition enter a certified copy of the record in the above entitled cause in the United States District Court, for the Southern District of California, Northern Division, and that your petitioner will pay all costs that are awarded by the said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

WHEREFORE your petitioner prays that this Court accept this petition and said bond and surety, and that said action be removed into said District Court of the United States, for the Southern District of California, Northern Division, pursuant to the statutes in such cases made and provided, and

that this Court proceed no further in this action, except to make the Order of Removal as prayed for; accept and approve the bond presented herewith, and direct the Clerk of this Court to prepare a certified copy of the record in the above entitled action for entry in the said District Court of the United States, for the Southern District of California, Northern Division.

And your petitioner will ever pray, etc.

Dated February 15th, 1934.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

By ROBERT BRENNAN
LEO E. SIEVERT
H. K. LOCKWOOD
Attorneys for Petitioner

A true copy, Dec. 20, 1934.

Attest, Etc. of Petition for Removal fld. in Transcript of Record in case 718-Law.

[Seal] R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.

By L. Wayne Thomas,
Deputy.

In the Superior Court of the State of California in and for the County of Fresno.

No. 51588.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

ORDER OF REMOVAL.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, defendant in the above named action, having, within the time provided by law, filed its petition in due form for the removal of said action to the District Court of the United States for the Southern District of California, Northern Division, and having at the same time offered a good and sufficient bond, as required by law, and said Bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States for the Southern District of California, Northern Division:

NOW, THEREFORE, IT IS HEREBY ORDERED that said action be removed into the District Court of the United States for the Southern District of California, Northern Division, and that all

further proceedings in this Court in said action be and they are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in said United States District Court.

DONE this 23rd day of February, 1934.

C. E. BEAUMONT

Judge

[Endorsed]: No. 51588. Filed Feb 23 1934. J. Reed Schaeffer, Clerk, By L. H. Bendoski, Deputy.

[Endorsed]: Filed Mar 19 1934. R. S. Zimmerman, Clerk, by L. Wayne Thomas, Deputy Clerk.

District Court of the United States, Southern District of California, Central Division.

United States of America
Southern District of California—ss.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of ORDER OF REMOVAL made by the Superior Court in and for the County of Fresno, No. 51588, contained in the transcript of record filed on March 19, 1934 in this Court in the case of J. W. TIPTON, Plaintiff vs. Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant, No. 718 Civil, Northern Division, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court, this 17th day of December, A. D. 1934.

R. S. ZIMMERMAN, Clerk

[Seal] By EDMUND L. SMITH, Deputy Clerk

[Endorsed]: Filed United States Circuit Court of Appeals, Jan. 23, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Monday, June 24, 1935.

Before: GARRECHT, DENMAN and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND ENTRY OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Before: WILBUR and GARRECHT, Circuit Judges, and CAVANAH, District Judge.

GARRECHT, Circuit Judge:

Appellant filed in the Superior Court of the State of California for the County of Fresno a complaint alleging that defendant corporation was authorized to do business in the State of California, and was doing business as a common carrier by railroad of interstate commerce and that its tracks were maintained as a highway of interstate commerce; that he was employed by defendant as a switchman; that while assisting in "spotting" a car at a storehouse of defendant in the town of Riverbank in said state, he was injured because a defective cut-lever used in detaching the car failed to operate when manipulated by a fellow employee; that by reason of such defective uncoupling appliance appellant was crushed between the care and the storehouse platform, being severely injured. Claiming to have been totally incapacitated, he prayed damages in the sum of $40,000.

Appellee, a Kansas corporation, had the cause removed to the Federal District Court. That court granted appellee's demurrer, interposed upon the

ground that the complaint did not state facts sufficient to constitute a cause of action, and dismissed the cause without leave to amend. Plaintiff appeals.

Plaintiff bases his case upon the contention that defendant's railroad was engaged in interstate commerce and that its tracks were, therefore, a "highway of interstate commerce", thereby bringing his action within the Safety Appliance Acts.

Defendant contends that the complaint fails by proper averment to allege that at the time of his injury plaintiff was engaged in interstate commerce and, therefore, the laws of the State of California did not give him a right of action, but that he was required to proceed before the State Industrial Accident Commission. Plaintiff insists that he is not so limited in his remedy, but because the Federal government has legislated in the field, the State is effectively barred therefrom (by the Safety Appliance Acts), and, therefore, the Workmen's Compensation Act has no application.

Plaintiff does not predicate his action upon the Federal Employers' Liability Acts; it is well settled that such Acts do not afford a remedy unless the employee was engaged in interstate commerce at the time the injury was suffered. Ill. Central R. R. Co. v. Behrens, 233 U. S. 473.

Appellant cites a line of cases,* presumably fol-

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*McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918; Ross v. Schooley, 257 Fed. 290 (C. C. A. 7), cert. den. 249 U. S. 615; Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, cert. den.

lowing Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, which hold that where a cause of action arising in intrastate commerce falls within the Federal Safety Appliance Acts, it is not subject to state compulsory workmen's compensation, but that an injury arising out of violation of the Safety Appliance Acts gives rise to an action for compensatory damages.

The Safety Appliance Acts were designed "to promote the safety of employees and travelers" and Ross v. Schooley, cited in the margin, proceeded upon the assumption or under the rule that the persons for whose benefit or protection a statute is enacted are entitled to compensation for violation of it, if they are injured by or through such violation. That case went on to say that "It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, * * *" and concluded that the "operativeness" of the act was not dependent upon the legislative wills of the several states. The Ballard case, cited in the margin, supra, decided by the State District Court of Appeals, adhered to this doctrine and held that the Workmen's Compensation Act of the State of California did not apply.

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256 U. S. 696; Ballard v. Sacramento No. R. Co., 126 Cal. App. 486; 14 P. (2) 1045; Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618; Kenna v. Calumet, H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3; Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1; Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847.

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Appellant places great reliance upon Texas & Pacific Ry. v. Rigsby, 241 U. S. 33. In the opinion (p. 41) there appear the words:

> "* * * In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. * * * Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, it may be con-

ceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States, is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several States, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject."

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But the latest pronouncement of the Supreme Court of the United States—Gilvary v. Cuyahoga Valley Ry. Co., 292 U. S. 57—does not support this contention. In that case plaintiff, while engaged in intrastate commerce, was injured, so he alleged, by failure of defendant to comply with the Safety Appliance Acts. Judgment of the Ohio Court of Appeals for respondent was affirmed by the Supreme Court of Ohio, 188 N. E. 4, by a divided court. Certiorari was sought in the Supreme Court of the United States, and granted. In accordance with the Ohio (where the action arose) workmen's compensation act, petitioner and respondent had theretofore notified the industrial accident commission that they elected, in case of any injury sustained by petitioner while engaged in intrastate commence, to have their respective rights and liabilities governed by the provisions of that act.

The Supreme Court stated the question in this fashion:

> "As the petitioner when injured was not engaged in interstate commerce, the Federal Employers Liability Act does not apply, and the question is whether the agreement of the parties, in pursuance of the Ohio statute, is repugnant to the Federal Safety Appliance Acts."

At page 61 (of 292 U. S.) it is said:

> "Petitioner cites language in Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41. But that case is not in point on the question under con-

sideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.' * * * These Acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act. There is nothing in the agreement repugnant to them."

The Supreme Court, in Moore v. Chesapeake & Ohio Ry. Co., 291 U. S. 205, 215, discusses the Acts as follows:

"* * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original Act of 1893 made no provision for suits, except for penalties. That Act did impliedly recognize the employee's right of action by providing in Sec. 8 that he should not be

deemed to have assumed the risk or injury occasioned by the breach of duty. But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in cash of death of the employee. While dealing with the assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. * * * In these respects the amended Act of 1903 made no change, notwithstanding the enlargement of the scope of the statutory requirements. The Act of 1910, by a proviso in Sec. 4 relating to penalties (36 Stat. 299), provided that nothing in that section should 'be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee' caused by the use of the prohibited equipment.

"The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (Texas & Pacific R. Co., v. Rigsby, supra, at pp. 39, 40) and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts

precluded the State from incorporating in its legislation, applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this court said in Minneapolis, St. P. & S. S. M. Ry. Co. v. Popplar, supra [237 U. S. 369], as to an action for injuries sustained in intrastate commerce: 'The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.' "

We note that the Ohio workmen's compensation act in the Gilvary case, supra, was voluntary in the instance just referred to, while the California Act is compulsory. On this basis appellant asserts that the Gilvary case is not applicable because, under an elective system, the parties put their rights in contract.

As the Supreme Court said in the Gilvary case, supra, the question is one of repugnancy to the Safety Appliance Acts. If the agreement in that case was not repugnant to the Acts, how can it be said that a compulsory statute, which accomplishes the same purpose is inconsistent therewith? If the

State Law can provide that the parties may agree to apply the Workmen's Compensation law, then, in view of the results to be accomplished, the State law may imply or compel the agreement.

We think particularly significant the language of the Supreme Court in Minneapolis, St. P. & S. S. M. Ry. Co. v. Popplar, 237 U. S. 369, 372 (quoted in the Moore case, supra):

> "The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State. * * *"

We conclude that irrespective of the compulsory features of the state law, under the decisions above noted, the enforcement is to be had under the applicable state statute. And the applicable state statute in this instance is the Workmen's Compensation Act.

The Safety Appliance acts merely eliminate the defense of assumption of risk; they do not bar the defense of contributory negligence (as pointed out in the Moore case, supra). The Workmen's Compensation Act affords the remedy.

> "The obvious intent of the [Workmen's Compensation] act was to substitute its procedure

for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages, with their pleas of negligent acts or omissions in the way of providing suitable places to work, or proper appliances and the like; and with their defenses of assumed risks or of the negligence of fellow servants, or of contributory negligence; and with the uncertainties or inequities incident to jury trials; all elements of damage, defense, or consequence, * * *."

Cooper v. Industrial Acc. Com., 177 Cal. 685, 687.

The Safety Appliance Acts do not furnish a remedy, nor the machinery therefor, but merely imply a remedy and limit the available defenses, where the injury is caused through violation of such Acts. The injury not arising out of interstate commerce, the remedy is to be found in the state statutes—in this case, the Workmen's Compensation Act.

In view of the fact that counsel for appellee concedes the cause to have been properly removed from the State court, and after inspection of the certified copies of the removal papers, heretofore filed, and no objection being made, the motion of appellant for diminution of the record is granted.

Judgment affirmed.

[Endorsed]: Opinion. Filed June 24, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 7571.

J. W. TIPTON,

Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED AND ADJUDGED by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun 24 1935. Paul P. O'Brien, Clerk.

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United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Monday, October 21, 1935.

Before: WILBUR, GARRECHT and HANEY, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration of appellant's petition, filed August 21, 1935, for a rehearing of above cause, and of his supplemental authorities in support of petition, filed August 31 and September 6th, and of reply of appellee thereto, filed September 18th, and by direction of the court, IT IS ORDERED that the petition for rehearing be, and hereby is denied.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-one (51) pages, numbered from and including 1 to and including 51, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23 day of November, A. D. 1935.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 10, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,218. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 664. J. W. Tipton, Petitioner, vs. Atchison, Topeka & Santa Fe Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed December 30, 1935. Term No. 664, O. T., 1935.

(7484-C)